In the Supreme Court of the United States

OCTOBER TERM, 1970
No. 1742

UNION CARBIDE CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet officially reported. The Board's decision and order (Pet. App. 10a–35a) are reported at 174 NLRB No. 147.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a–10a) was entered on March 2, 1971. The petition for a writ of certiorari was filed on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the employer violated Section 8(a)(1) of the National Labor Relations Act by discharging

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employees in one department for refusing to cross a lawful picket line established at the employer's premises by his striking employees in another department.

2. Whether the Board properly found that the jobs of the discharged employees had not been eliminated.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 2–3 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner manufactures chemicals at two plants ("South Charleston" and "Institute") in the Charleston, West Virginia area. It also operates in that area a "Technical Center" at which it employs craftsmen and laborers who perform the construction and installation work at its production plants. (Pet. App. 12a–14a.) These employees are not represented by a labor union. Following unsuccessful negotiations with the Company regarding a new contract, the production and maintenance employees of the South Charleston plant, represented by the International Association of Machinists, called an economic strike to commence at midnight, July 24, 1967. These employees began picketing the plant the next day, July 25. (Pet. App. 15a, 16a; A. 55, 113.) [1]

[1] "A." refers to the Appendix to the briefs in the court below.

Anticipating the strike, the Company, on July 24, called together the construction department employees who were working at the South Charleston plant, in an attempt to persuade them to continue working there. Supervisors read a statement ("the Tailgate Message") to groups of these employees, which warned that they were expected to work even though the plant was struck, and that failure to do so would subject them to "disciplinary action." The statement also informed them which gates to use during the strike. (Pet. App. 15a–16a; A. 113–114, 169.) In addition to reading the statement, the supervisors advised the construction department employees that, if picket line violence occurred, each individual employee would be "responsible for his own welfare" and that, if they did not cross the picket lines, they would be subject to discharge (A. 35–36, 64–65, 89).

The Company also instructed its supervisors to make contact with an employee after three days of absence and attempt to convince him to return to work in order to avoid disciplinary action. After five days of absence, the employee would be sent a letter warning him of probable discharge if he remained absent from work for a period of four more days; after nine days of absence, he would be notified that he was discharged. (Pet. App. 17a–18a; A. 114–115.)

On the morning of July 25, employees Elza Moss (a pipe welder with six years seniority), Henry Mullins (a journeyman pipefitter with eight years seniority), and Alan Withrow (an apprentice pipefitter) appeared at the gates to the South Charleston

plant in order to report for work. They found the gates being picketed by the IAM production and maintenance employees, and each of them decided not to cross the picket line. (Pet. App. 16a; A. 38–39, 65–66, 89–90.) Moss did not enter the plant because he was "afraid" and because it was a matter of "principle," having "never crossed a picket line in [his] life" (Pet. App. 16a; A. 58–59, 60). He returned home, and called the plant to advise that he would not be working that day because of the picket line (Pet. App. 17a; A. 38–39). Moss continued to report to work at various times thereafter, but each time he encountered the picket line, returned home, and then notified the Company by telephone that he could not work because of the picket line (Pet. App. 17a; A. 39–40). Withrow decided not to cross the picket line "as a matter of principle," and Mullins, because it was "dangerous" (Pet. App. 16a; A. 84–85, 92, 98–99). They, too, notified the Company that they were unable to work because of the picket line and continued this procedure on succeeding days while the picket line was in front of the plant (Pet. App. 17a; A. 67–69, 77–82, 90–91, 99–100).

Thereafter, the Company, as planned, phoned and sent letters to the absent employees,[2] including Moss, Mullins and Withrow, advising them that it would

[2] When the strike began on July 25, approximately 109 construction employees out of the 425 then assigned to work at South Charleston were absent. By the ninth day, the number of absentees had dwindled to about 11, including Moss, Mullins and Withrow. All 11 were ultimately discharged. Only Moss, Mullins, and Withrow, however, filed charges with the Board. (Pet. App. 12a, 18a; A. 116, 120.)

regard their continued absence from work "as terminating your employment with Union Carbide" (Pet. App. 18a–19a; A. 170, 173, 175). Moss requested vacation leave, leave of absence without pay, or a transfer to Company jobs other than at the South Charleston plant. All these requests were refused (Pet. App. 19a; A. 41–42). Withrow asked for a "leave of absence" and was similarly refused (A. 70–71).

Thereafter, by letters dated August 10 and 11, 1967, the Company advised Moss that he had been "removed from the payroll" and that money owed him would be forwarded to him (Pet. App. 19a; A. 171–172). Mullins called the Company on August 7, and was told that he had been "terminated" (A. 93, 176).

On October 8, 1967, the strike ended at the South Charleston plant and the picket lines were removed (Pet. App. 19a). Employee Withrow immediately returned to the plant and requested reemployment. The Company informed him that, since he had failed to report for work following receipt of the letter warning of possible discharge, he "was fired." He was also told that he could reapply for employment but that he would have to "start back in the labor gang and work [his] way back up with no seniority * * *." Withrow refused and left. (Pet. App. 20a; A. 73–76.)

B. THE DECISIONS BELOW

The Board held that, in respecting the picket line of their fellow employees, Moss, Mullins, and Withrow were engaged in concerted activity protected by Section 7 of the Act; and that the Company violated Section 8(a)(1) of the Act by threatening to discharge,

and then actually discharging, them for engaging in such activity (Pet. App. 21a–23a, 28a–29a, 34a). The Board rejected the Company's alternative contention that, even if the activity were protected, it was not required to reinstate the three employees because their jobs had been eliminated. The Board found that, although the Company had a policy of decreasing its work force by "normal attrition," the unlawful discharge of the three employees did not result from such attrition. (Pet. App. 26a–27a, 34a.) The Board ordered the Company, *inter alia,* to reinstate the three employees and to make them whole for any loss of pay from the date the strike was terminated (Pet. 34a).

The court of appeals (with Judge Bryan dissenting) enforced the Board's order except as to Mullins. The court held that, since Mullins testified that he refused to cross the picket line because of "fear," he was not making common cause with the strikers; therefore his refusal was not activity protected by Section 7. (Pet. App. 4a–5a, 9a.)

ARGUMENT

1. The holding of the court below that employees Moss and Withrow were engaged in activity protected by Section 7 of the National Labor Relations Act when they refused to cross the picket line established by their fellow employees is correct and does not warrant further review. "Primary employees have traditionally been assured the right to take concerted action against their employer to gain the 'mutual aid or protection' guaranteed by § 7 of the * * * Act. * * *

whether or not the resolution of the particular dispute directly affects all of them." *Houston Insulation Contractors* v. *National Labor Relations Board,* 386 U.S. 664, 668. Thus, when an employee in one bargaining unit refuses to cross a picket line maintained against his employer by fellow employees in another bargaining unit, he "has in effect plighted his troth with the strikers, joined in their common cause, and has thus become a striker himself." *National Labor Relations Board* v. *Southern Greyhound Lines,* 426 F. 2d 1299, 1301 (C.A. 5). Accordingly, just as with any other striking employee, the employer, in the interest of running his business, may permanently replace the sympathy strikers, but may not discharge or take other reprisals against them. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 347; *National Labor Relations Board* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 379.

The holding of the court below is in accord with that of other courts of appeals in similar factual situations. *Southern Greyhound Lines, supra* (C.A 5); *National Labor Relations Board* v. *Difco Laboratories,* 427 F. 2d 170 (C.A. 6), certiorari denied, 400 U.S. 833.[3] *National Labor Relations Board* v. *Rockaway*

[3] In *National Labor Relations Board* v. *Illinois Bell Telephone Co.,* 189 F. 2d 124 (Pet. 5), the Seventh Circuit held that employee refusals to cross a picket line were unprotected. However, the court relied, in part, on the fact that the employees who refused were acting in defiance of their union representative. See *Harnischfeger Corp.* v. *National Labor Relations Board,* 207 F. 2d 575, 580 (C.A. 7). No similar problem exists here. Moreover, insofar as *Illinois Bell* may be deemed to hold that such refusals constitute individual, rather than concerted,

News Supply Co., 345 U.S. 71, and *National Labor Relations Board* v. *L. G. Everist*, 334 F. 2d 312 (C.A. 8) (Pet. 5, 7), involve the right of an employer to discharge employees who refuse to cross a picket line at *another* employer's premises; employees in this situation are more vulnerable to discharge by their employer, because the mutuality of their interest and that of the strikers is more remote. See *Truck Drivers Local 413* v. *National Labor Relations Board*, 334 F. 2d 539, 543–544 (C.A. D.C.).

2. Petitioner's contention that, in any event, it was not required to reinstate Moss and Withrow because their jobs were eliminated brings into question a factual finding which does not warrant further review. The Board found that, although the Company had a policy at the time of the discharges of not replacing employees who *voluntarily* quit, no employees were being laid off (*supra*, p. 6). Accordingly, the Board reasonably concluded that, had the employees not been unlawfully discharged, their jobs would have continued.

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activity, the Seventh Circuit has subsequently rejected that view. See *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 646 (C.A. 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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